3-5-2012

State v. Lish Appellant's Brief Dckt. 38740

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38740
	)	
v.	)	
	)	
JEFFERY T. LISH,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and Course of Proceedings 1

ISSUE PRESENTED ON APPEAL 5

ARGUMENT 6

The Evidence Was Insufficient To Support The Jury's Finding Of Guilt 6

A. Introduction 6

B. Standard Of Review 6

C. The Evidence Was Insufficient To Support The Jury's Finding Of Guilt 7

1. The Evidence Was Insufficient To Establish A Course Of Conduct 8

2. The Evidence Was Insufficient To Establish That Ms. Woods Was "Seriously Annoy[ed], Alarm[ed] Or Harass[ed]" Or That A Reasonable Person Would Suffer "Substantial Emotional Distress" As A Result Of Mr. Lish's Behavior 11

a. The Subjective Standard 11

b. The Objective Standard 13

CONCLUSION 14

CERTIFICATE OF MAILING 15

TABLE OF AUTHORITIES

Cases

Bott v. Idaho State Bldg. Auth., 128 Idaho 580 (1996) 6

State v. Johnson, 131 Idaho 808 (Ct. App. 1998) 6

State v. Peite, 122 Idaho 809 (Ct. App. 1992) 6

State v. Stewart, 149 Idaho 383 (2010) 7

Statutes

I.C. § 18-7906(1) 7

I.C. § 18-7906(1)(a) 11, 14

I.C. § 18-7906(2)(a) 7

I.C. § 18-7906(2)(c) 8

STATEMENT OF THE CASE

Nature of the Case

Jeffery T. Lish appeals from the judgment of conviction for stalking in the first degree entered following his jury trial. Mr. Lish asserts that the evidence was insufficient to support the jury's finding of guilt in two particulars: (1) because the State did not present substantial evidence that Mr. Lish engaged in a prohibited course of conduct, and (2) because the State did not present substantial evidence that, assuming he engaged in a prohibited course of conduct, any conduct engaged in by Mr. Lish caused the alleged victim to be "seriously annoy[ed], alarm[ed] or harass[ed]" or "would cause a reasonable person substantial emotional distress."

Statement of the Facts and Course of Proceedings

Mr. Lish was charged by information with stalking in the first degree, alleged to have been committed as follows:

> That the said JEFFERY TODD LISH, in the County of Bannock, State of Idaho, on or between the 27th day of March 2010 and the 3rd of April, 2010, did knowingly and maliciously engage in a course of conduct that seriously alarmed, annoyed or harassed the victim causing substantial emotional distress to the victim, LINDA WOODS, and/or having been previously convicted of a crime under this section or section 18-7906, Idaho Code.

(R., p.51.)

The alleged victim, Ms. Woods, testified at trial that she and Mr. Lish began dating in September of 2009. (Tr., p.19, Ls.10-12.) They first broke-up in mid-February of 2010, before getting back together a couple of days later after he contacted her to reconcile. (Tr., p.20, L.25 – p.21, L.16.) They broke-up for the second time in early March of 2010 (Tr., p.21, Ls.22-24), before getting back together again a few days later

after Mr. Lish contacted her to reconcile. (Tr., p.51, L.20 – p.52, L.7.) They broke-up for the third and final time on March 25, 2010. (Tr., p.22, Ls.15-21.)

On March 27, 2010, Mr. Lish contacted Ms. Woods at their church in an attempt to get back together with her. (Tr., p.23, L.23 – p.24, L.23.) On March 28, 2010, he sent her a text message telling her that he was on his way over to her house. She sent a text message back saying, "Don't come over." He then called her to say the he was almost at her house, and he arrived at her front door a few second later. Ms. Woods described him as being "pretty mellow[,]" and explained that she did *not* tell him not to have further contact with her because she maintained the hope that they could still be friends. (Tr., p.29, L.11 – p.31, L.1.)

On March 30, 2010, Mr. Lish again went to Ms. Woods' home. They discussed a voice mail that Ms. Woods' ex-husband, Kelly Woods, had left for him telling him to stop having contact with Ms. Woods. Mr. Lish told Ms. Woods that he took the message to be a threat, and had spent the morning filing charges against Mr. Woods. After about ten minutes, Mr. Lish left when Ms. Woods told him that she had to go to work. She still had not told him not to have contact with her. Ten minutes after she got to work that day, her ex-husband arrived to say that Mr. Lish had called him to say that he was filing charges against him. It was at that point that she decided to have Mr. Woods go to the police on her behalf. Officer Boll then contacted her by telephone to ask what she wanted to do. She told Officer Boll to tell Mr. Lish that she no longer wished to have contact with him. Officer Boll told her that he would relay that message to Mr. Lish. (Tr., p.31, L.19 – p.35, L.4.)

Officer Boll testified that, after learning of Ms. Woods' wishes, he used Mr. Woods' cell phone to contact Mr. Lish.[1] He told Mr. Lish that "he could not contact her for the purpose of pursuing their relationship[.]" Officer Boll described their conversation as follows:

> I talked to him about the complaints of unwanted contact, both via phone and text messages and other forms of electronic media, and also not coming to the residences of either Kelly or his ex-wife, and also not coming to her place of employment at Applebee's.

Mr. Lish then explained that he and Ms. Woods attended the same church, and asked whether he could continue to attend the church. Officer Boll explained that "if he saw her specifically [at church], he could not continue to pursue reconciling the relationship." (Tr., p.119, L.17 – p.120, L.22.)

The next contact between Mr. Lish and Ms. Woods occurred at their church on April 3, 2010. Ms. Woods testified that she saw Mr. Lish sitting in the back row pointing what she believed was a video camera in her direction while she was practicing with the church band. That incident lasted approximately the length of one song. After the service, she saw him standing near the front door with his cousin, and when she

> tried to go out the door, he took a step forward and asked if he could hold my daughter, who was very excited to see him because she's four . . . So I handed her to him for a second. She gave him a hug, [and I] took her back. I didn't say a word to him, and I walked out the door.

(Tr., p.35, L.22 – p.39, L.21.)

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[1] Officer Boll's testimony is inconsistent with Ms. Woods' testimony in one respect: she testified that she directed her ex-husband to contact the police only after her March 30, 2010, encounter with Mr. Lish, and that she spoke to Officer Boll about her desire to have no further contact with Mr. Lish that day. (Tr., p.31, L.19 – p.34, L.18, p.64, Ls.2-4.) Officer Boll testified that he became involved when Mr. Woods arrived at the police station on March 29, 2010. (Tr., p.116, Ls.10-16.) Mr. Woods testified that the encounter that Ms. Woods' described as occurring on March 30, 2010, occurred on March 29, 2010. (Tr., p.90, L.13 – p.93, L.11.)

Ms. Woods testified that she had no further contact with Mr. Lish after the incident at the church, and that the church incident constituted the only "personal contact" that they had after she requested that Officer Boll convey her no contact request. (Tr., p.63, L.23 – p.64, L.1.) A manager at Applebee's, where Ms. Woods worked, testified that sometime "in early April" of 2010, Mr. Lish entered Applebee's, asked if Ms. Woods was working, was told no, and left. (Tr., p.109, Ls.10-23.)

At the conclusion of the trial, the jury found Mr. Lish guilty of stalking.[2] (Tr., p.236, Ls.4-23.) Mr. Lish then waived his right to a trial on the issue of his prior conviction, and acknowledged that he had previously been convicted of stalking, making the current charge stalking in the first degree. (Tr., p.239, L.18 – p.240, L.10.)

At sentencing, defense counsel asked that Mr. Lish be placed on probation, without requesting a specific underlying sentence. (Tr., p.248, Ls.10-13.) The State requested that the district court impose a unified sentence of four years, with one and one-half years fixed, while retaining jurisdiction. (Tr., p.252, Ls.1-4.) Ultimately, the district court imposed a unified sentence of three years, with one and one-half years fixed, and retained jurisdiction for one year, with a recommendation that Mr. Lish be sent on a traditional rider. (Tr., p.255, Ls.12-17.)

Several months into Mr. Lish's rider, the district court received a recommendation that it relinquish jurisdiction. Following a hearing, the district court relinquished jurisdiction, without modifying Mr. Lish's underlying sentence. (R., pp.177-78.) Mr. Lish filed a Notice of Appeal timely from the order relinquishing jurisdiction.[3] (R., p.186.)

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[2] The jury had not been informed of Mr. Lish's prior conviction, which made this incident a felony, for purposes of reaching its initial verdict.

[3] Before filing his Notice of Appeal, defense counsel filed an Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion requesting leniency but providing no new information. (R., pp.182-83.) The district court denied the motion. (R., p.184.) Because no new

ISSUE

Was the evidence sufficient to support the jury's finding of guilt?

information was provided in support of the Rule 35 motion, Mr. Lish does not raise the denial of his Rule 35 motion as an issue on appeal. *See State v. Huffman*, 144 Idaho 201, 203 (2007) (denial of a Rule 35 motion cannot be reviewed on appeal when no new information was presented in support of the motion).

ARGUMENT

The Evidence Was Insufficient To Support The Jury's Finding Of Guilt

A. Introduction

Under Idaho Code § 18-7906, a person commits stalking when that person engages in a course of conduct that "seriously alarms, annoys or harasses the victim and is such as would cause a reasonable person substantial emotional distress." Mr. Lish asserts that the evidence presented was insufficient to establish his guilt in two particulars: (1) it did not establish that Mr. Lish engaged in a prohibited course of conduct because the evidence did not establish at least two violations of a request for no contact, and (2) it did not establish that the alleged victim, Ms. Woods, was seriously annoyed, alarmed, or harassed, or that a reasonable person in her position would have suffered "substantial emotional distress."

B. Standard Of Review

The standard of review for an appellate court when considering the sufficiency of the evidence to sustain a conviction was set forth in *State v. Peite*, 122 Idaho 809, 823 (Ct. App. 1992), in which the Idaho Court of Appeals explained that:

> A conviction will not be set aside where there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. On appeal, we construe all facts, and inferences to be drawn from those facts, in favor of upholding the jury's verdict. Where there is competent although conflicting evidence to sustain the verdict, we will not reweigh the evidence or disturb the verdict.

Id. (citations omitted). "For evidence to be substantial, it must be of sufficient quality that reasonable minds could reach the same conclusion." *State v. Johnson*, 131 Idaho 808, 809 (Ct. App. 1998) (citing *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 586 (1996)).

C. The Evidence Was Insufficient To Support The Jury's Finding Of Guilt

Idaho Code § 18-7906 sets forth the crime of stalking in the second degree as follows:

> (1) A person commits the crime of stalking in the second degree if the person knowingly and maliciously:
>
> (a) Engages in a course of conduct that *seriously* alarms, annoys or harasses the victim and is such as would cause a reasonable person *substantial* emotional distress; or
>
> (b) Engages in a course of conduct such as would cause a reasonable person to be in fear of death or physical injury, or in fear of the death or physical injury of a family or household member.

I.C. § 18-7906(1) (emphases added). Mr. Lish was charged with stalking under subsection (a) of the stalking in the second degree statute, which was elevated to felony stalking in the first degree under I.C. § 18-7905 because of a previous conviction for stalking in the second degree. (R., pp.51-52.)

The statute defines "course of conduct" as follows:

> "Course of conduct" means repeated acts of nonconsensual contact involving the victim or a family or household member of the victim, provided however, that constitutionally protected activity is not included within the meaning of this definition.

I.C. § 18-7906(2)(a). Under the statute, then, a course of conduct must involve more than one instance of nonconsensual contact. *Id.*; *see also State v. Stewart*, 149 Idaho 383, 391 (2010) (course of conduct must consist of more than one act).

The statute defines "nonconsensual conduct" as follows:

> "Nonconsensual contact" means any contact with the victim that is initiated or continued without the victim's consent, *that is beyond the scope of the consent provided by the victim, or that is in disregard of the victim's expressed desire that the contact be avoided or discontinued.* "Nonconsensual contact" includes, but is not limited to:

(i) Following the victim or maintaining surveillance, including by electronic means, on the victim;

(ii) Contacting the victim in a public place or on private property;

(iii) Appearing at the workplace or residence of the victim;

(iv) Entering onto or remaining on property owned, leased or occupied by the victim;

(v) Contacting the victim by telephone or causing the victim's telephone to ring repeatedly or continuously regardless of whether a conversation ensues;

(vi) Sending mail or electronic communications to the victim; or

(vii) Placing an object on, or delivering an object to, property owned, leased or occupied by the victim.

I.C. § 18-7906(2)(c) (emphasis added).

1. The Evidence Was Insufficient To Establish A Course Of Conduct

It is necessary to examine the several contacts that occurred between March 27, 2010, and April 3, 2010, to determine which, if any, can form the basis for a course of conduct under the stalking statute. Prior to Officer Boll relaying Ms. Woods' wishes concerning contact after the March 29 (or March 30) incident at her home, Ms. Woods had not told Mr. Lish not to contact her. (Tr., p.29, L.11 – p.31, L.1.) Therefore, any incident occurring prior to Officer Boll's contact of Mr. Lish cannot form the basis for the course of conduct required to establish the crime of stalking. Only two incidents occurred after Officer Boll contacted Mr. Lish: when he went to Applebee's in early April while Ms. Woods was not there (Tr., p.109, Ls.10-23), and the incident that occurred at their church on April 3, 2010. (Tr., p.35, L.22 – p.39, L.21.)

In its closing argument, the State argued that Ms. Woods "didn't give him any consent. She said, 'I do not want any contact with you whatsoever.'" (Supp.Tr., p.27,

L.24 – p.28, L.1.) Based on the evidence, the State must have been referring to the message relayed by Officer Boll to Mr. Lish because Ms. Woods never testified that she personally told Mr. Lish to stop contacting her. An examination of that message reveals that Mr. Lish was told not to visit Ms. Woods' home or place of employment (Applebee's), that he could attend the same church, but that "if he saw her specifically [at church], *he could not continue to pursue reconciling the relationship.*" (Tr., p.120, Ls.19-22 (emphasis added).)

Leaving aside the question of whether a person can express, through a third party, a desire that contact be discontinued, it is clear that the definition of nonconsensual contact applicable to the facts of this case includes only contact that occurs in excess of the scope of what the victim has expressed.[4] In this case, that scope is defined by what Officer Boll told Mr. Lish were Ms. Woods' wishes.

With respect to Mr. Lish's visit to Applebee's, that was clearly in violation of the scope of the no contact message relayed by Officer Boll. As such, assuming that the behavior was malicious on the part of Mr. Lish, it can represent one of the minimum of two contacts necessary under the statute.

With respect to contact at their church, the evidence demonstrates that Mr. Lish was *not* told that he could not have any contact with Ms. Woods at their church; he was instead told that any contact could not include an attempt "to pursue reconciling the relationship." (Tr., p.120, Ls.19-22.) The evidence is undisputed that Mr. Lish was not

[4] Mr. Lish maintains that, concerning the nature of their past relationship and the fact that Ms. Woods did not indicate an unwillingness to consent to contact with Mr. Lish until she did so through Officer Boll on or about March 30, 2010, the portion of the definition of course of conduct providing for contact that is "initiated or continued without the victim's consent" is not applicable to the facts of this case. Should the State argue otherwise in its Respondent's Brief, Mr. Lish will offer a response through his Reply Brief.

told that he could not film the victim while at the church;[5] he was only told that any contact that occurred at the church could not involve an attempt to reconcile their relationship.

The evidence is undisputed that the only communicative contact that Mr. Lish had with Ms. Woods on April 3, 2010, occurred after the church service and did not include any discussion or attempt to discuss reconciling with Ms. Woods. The contact was described by Ms. Woods as occurring when Mr. Lish, who was standing by the door of the church with his cousin, saw her approaching with her daughter, and

> took a step forward and asked if he could hold my daughter, who was very excited to see him because she's four . . . So I handed her to him for a second. She gave him a hug, [and I] took her back. I didn't say a word to him, and I walked out the door.

(Tr., p.35, L.22 – p.39, L.21.) No evidence was presented that this limited communication involved an attempt by Mr. Lish to discuss their relationship, let alone attempt to reconcile it. Any such contact, then, could not have been done "knowingly" as required under the statute. As such, the contact at the church, including the purported video camera incident, cannot serve as a second underlying incident in a course of conduct for purposes of a stalking conviction.[6]

Because the State only demonstrated one incident (the Applebee's incident) that could be considered to be a violation of Ms. Woods' expressed desire regarding

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[5] Obviously, if a person is told not to have *any* contact with a victim, then the examples set forth in subsection (2)(c), including the prohibition on conducting surveillance of a victim, would apply without limitation (except with respect to constitutionally-protected activities). However, in Mr. Lish's case, he was only told that any church contact could not involve an attempt to reconcile the relationship with Ms. Woods.

[6] This, of course, leaves aside the issue of whether any such conduct was done maliciously, which was a question that the clearly jury grappled with. (*See* R., pp.140-42 (the jury had two questions during deliberations: one asked for clarification of the term "maliciously" while the other asked what to do if the jury could not reach a unanimous verdict).)

contact, there was no evidence that Mr. Lish engaged in a prohibited course of conduct, let alone *substantial* evidence to support a jury finding on that element of the stalking statute. As such, this Court should vacate the judgment of conviction, and remand this matter to the district court for entry of a judgment of acquittal on the charge of stalking in the first degree.

2. The Evidence Was Insufficient To Establish That Ms. Woods Was "Seriously Annoy[ed], Alarm[ed] Or Harass[ed]" Or That A Reasonable Person Would Suffer "Substantial Emotional Distress" As A Result Of Mr. Lish's Behavior

Even assuming, *arguendo*, that Mr. Lish's behavior constituted a course of conduct (which he disputes in the preceding subsection), that behavior is not such that it caused Ms. Woods to be "seriously annoy[ed], alarm[ed] or harass[ed]" or that it would have caused a reasonable person "substantial emotional distress." Under the plain language of the statute, a victim must be both "seriously annoy[ed], alarm[ed] or harass[ed]" as a result of a defendant's course of conduct (a subjective standard), and that course of conduct must also be of such a character that it would cause "a reasonable person substantial emotional distress" (an objective standard).[7] I.C. § 18-7906(1)(a).

a. The Subjective Standard

At trial, Ms. Woods testified about her feelings concerning only one of the two incidents that occurred after she asked Officer Boll to relay her feelings concerning

[7] This limitation is important because it prevents criminalizing conduct that only offends a person who is overly sensitive to annoying but otherwise innocent behavior, such as multiple telephone calls from a bill collector or a door-to-door salesman who repeatedly ignores a "No Soliciting" sign (both of which would be criminal given an overly sensitive victim and the lack of an objective standard).

future contact with Mr. Lish.[8] As for the April 3, 2010, church incident she explained that she was "really annoyed and angry" because Mr. Lish appeared at their church earlier than usual. She explained that she felt annoyed because "he doesn't ever come that early [and] I didn't want to see him anymore. And he knew that. And it just made me extremely uncomfortable."

With respect to the incident near the door, she explained that she "was really annoyed" and "angry" because she "didn't want any contact with him[,]" "didn't want to see him[,]" and "didn't want to talk to him."[9] (Tr., p.37, L.4 – p.40, L.2.) However, because none of Mr. Lish's behavior during the April 3, 2010, church incident violated the *expressed* consent and wishes of Ms. Woods (as relayed by Officer Boll), they could not have provided the basis for a finding that his behavior subjectively caused her serious annoyance, alarm, or harassment.

However, it was only after she "was presented with a public record on him" following the April 3, 2010, church incident that she "decided to go to the police and press charges because it was just going to get worse." (Tr., p.40, Ls.3-7.) Mr. Lish never contacted Ms. Woods in any way after the April 3, 2010, church incident, and, therefore, his course of conduct could not have been responsible for any feelings of serious annoyance, alarm, or harassment that she may have felt as a result of information learned only after any course of conduct ended.

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[8] She did not testify as to her feelings about the Applebee's incident. (Tr., p.35, Ls.5-17.)

[9] Unfortunately for (and unknown to) Ms. Woods, Officer Boll gave Mr. Lish express permission to be seen by her at their church, and to have any contact with her at their church that did not amount to an attempt to reconcile their relationship. (Tr., p.120, Ls.19-22.)

The State failed to present substantial evidence that Mr. Lish engaged in a course of conduct that caused Ms. Woods to feel seriously annoyed, alarmed, or harassed. As such, the judgment of conviction should be vacated, and this case should be remanded to the district court for entry of a judgment of acquittal on the charge of stalking in the first degree.

b. The Objective Standard

The question that must be answered with respect to the objective standard is whether the course of conduct (the Applebee's incident and the April 3, 2010, church incident) purportedly engaged in by Mr. Lish would have caused a reasonable person substantial emotional distress.

Mr. Lish does not dispute that a reasonable person might have been alarmed by the post-warning Applebee's visit. That only leaves the church incident for consideration. Mr. Lish asserts that the church incident, during which Mr. Lish attended a service at his own church the day before Easter and did not violate any of the expressed limitations on contact with Ms. Woods at their church, would not have caused a reasonable person to have felt substantial emotional distress.

While the standard to be applied is an objective one, it is worth noting that Ms. Woods only "decided to go to the police and press charges" after the church incident because she "was presented with a public record on him"[10] and decided that "it was just going to get worse." (Tr., p.40, Ls.3-7.) Mr. Lish never contacted, or attempted to contact, Ms. Woods in any way after the April 3, 2010, church incident, and,

[10] This is a reference to Mr. Lish's prior conviction for misdemeanor stalking. (Tr., p.68, Ls.11-24.) The district court had entered an order the morning of trial prohibiting any reference to Mr. Lish's prior conviction for stalking during the trial. (Tr., p.69, L.16 – p.70, L.2.)

therefore, anything that occurred after the church incident could not be said to have been the result of any course of conduct engaged in by him. Therefore, even if a reasonable person in Ms. Woods' situation would have felt substantial emotional distress after learning of the prior conviction, that would not be relevant to a determination as to whether Mr. Lish's course of conduct caused such substantial emotional distress. To hold otherwise would violate the plain language of the statute, which requires that *the course of conduct* "[e]ngage[d] in" by the defendant be what "would cause a reasonable person substantial emotional distress." I.C. § 18-7906(1)(a).

The State failed to present substantial evidence that assuming, *arguendo*, Mr. Lish engaged in a prohibited course of conduct, that any such conduct was such that it would have caused a reasonable person substantial emotional distress. As such, the judgment of conviction should be vacated, and this case should be remanded to the district court for entry of a judgment of acquittal on the charge of stalking in the first degree.

CONCLUSION

For the reasons set forth herein, Mr. Lish respectfully requests that this Court vacate his judgment of conviction, and remand this matter to the district court for entry of a judgment of acquittal on the charge of stalking in the first degree.

DATED this 5th day of March, 2012.

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of March, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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INMATE #98050
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381 W HOSPITAL DRIVE NORTH
OROFINO ID 83544

DAVID C NYE
DISTRICT COURT JUDGE
E-MAILED BRIEF

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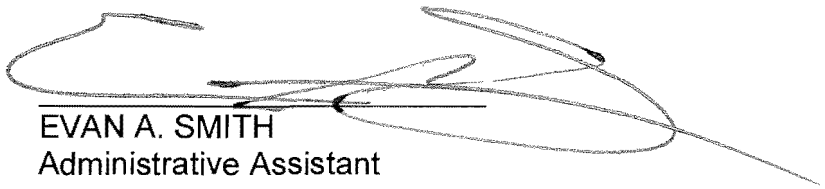

EVAN A. SMITH
Administrative Assistant

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